SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES ET AL. *v.* LARRY STEWART

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–139. Decided October 17, 1988

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

Because courts usually do not award remedies in cases that are moot, the novel legal issues presented here do not require this Court's plenary consideration, at least at this time. I therefore would just deny the petition for certiorari. Inasmuch, however, as the Court has chosen to grant the petition, I would give the case plenary consideration with full briefing and argument. Because I believe that summary reversal is inappropriate, I dissent.

The Court summarily reverses the Court of Appeals' judgment for being contrary to "our holding in *Hewitt* [v. *Helms*, 482 U. S. —— (1987)]," *ante*, at 2. That case clearly does not control here. In *Hewitt*, the plaintiff never obtained a "formal judgment in his favor," *id.*, at —— (slip op. 5), and the question there was whether he nonetheless could qualify as a "prevailing party," thereby making him eligible for attorney's fees under 42 U. S. C. § 1988. The Court ruled that he could not because nothing about his lawsuit changed the defendants' behavior towards him.

Here, however, respondent did obtain "a formal judgment in his favor," although he no longer was incarcerated at the time. Thus, this case presents the question whether to be a "prevailing party" it is enough to win one's lawsuit. *Hewitt* did not decide this question, nor could it have, since it did not concern a plaintiff who had obtained "all or some of the relief he sought through a judgment." 482 U. S., at —— (slip. op. 5).

The Court quotes a passage from *Hewitt* and construes it as stating that the entry of a declaratory judgment, without practical consequences, would not suffice for the purposes of § 1988. *Ante*, at 3. In context, however, this passage simply bolsters the Court's point about when a nonfinal "statement of law" in a judicial opinion may be deemed the functional "equivalent of declaratory relief" under § 1988. 482 U. S., at —— (slip op. 5). Indeed, it would be ironic if this passage purported to resolve a question not before the Court in *Hewitt*, as it extols the "judicial pronouncement" limited to resolving the particular "case or controversy" at hand rather than rendering an "advisory opinion" on a question not presented by the facts of the immediate dispute. *Ibid.* Thus, I believe that the *Hewitt* opinion was not meant to tell us, or the Court of Appeals, how to decide this case. But even if it did, I would not summarily reverse the Court of Appeals on this basis for the very reason that our own pronouncements lose their controlling authority when they attempt to decide questions not before the Court at the time.[1]

Quite apart from the Court's interpretation of *Hewitt*, I have doubts about its interpretation of the term "prevailing party" in § 1988. In ordinary usage, "prevailing" means winning. In the context of litigation, winning means obtaining a final judgment or other redress in one's favor. While the victory in this case may have been an empty one, it was a victory nonetheless. In the natural use of our language, we often speak of victories that are empty, hollow, or Pyrrhic. Thus, there is nothing anomalous about saying that respondent prevailed although he derived no tangible benefit from the judgment entered in his favor. Certainly the language

[1] See *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 272, 275 (1982) (dissenting opinion) (summary reversal is inappropriate when this Court's prior precedents do not "mandate" or "compel" reversal). See also *EEOC* v. *FLRA*, 476 U. S. 19, 26, n. 5 (1986) (STEVENS, J., dissenting) (this Court customarily reserves summary dispositions for settled issues of law).

of the statute does not so obviously compel a contrary conclusion as to warrant summary reversal.[2]

It is true that respondent here should not have obtained his judgment, since his case had become moot. But the fact that a party should not have "prevailed" ordinarily would not deprive him of attorney's fees.[3] Perhaps an exception should be made when the defect in the judgment goes to the court's jurisdiction, as mootness does, but the resolution of this issue is not obvious.[4] It surely is not one that should be decided without benefit of briefing and oral argument.

I dissent from the Court's summary disposition of this case.

[2] See *Ganey* v. *Edwards*, 759 F. 2d 337, 340 (CA4 1985) (plaintiff is entitled to attorney's fees simply because judgment was entered in his favor). In addition, other Courts of Appeals have held that a judgment of nominal damages suffices for § 1988. *E. g.*, *Skoda* v. *Fontani*, 646 F. 2d 1193 (CA7 1981); *Perez* v. *University of Puerto Rico*, 600 F. 2d 1 (CA1 1979).

[3] For example, if a defendant failed to raise a statute of limitations defense and the court entered a judgment for the plaintiff, and that judgment became final, I assume that the defendant later could not object to an award of attorney's fees on the ground that the plaintiff should not have prevailed because his claim was barred by the statute of limitations.

[4] Cf. *Garrity* v. *Sununu*, 752 F. 2d 727, 736, n. 8, 738 (CA1 1984) (an Eleventh Amendment issue not previously raised may not be used "to collaterally attack the court's judgment solely for the purpose of avoiding payment of the fees award") (footnote omitted).